Supreme Court of Michigan.

GEORGE H. GALE *v.* THE VILLAGE OF KALAMAZOO.

Where the proper village authorities having power to make contracts on its behalf, assume officially to enter into an engagement which only the corporation could properly make, and in so doing declare themselves and their successors bound by its conditions, it will be deemed the contract of the corporation, and not of the officers.

The trustees of a village are incompetent to make a contract by which the governing authority abdicates any of its legislative powers, or by which it is precluded in the future from legislating in regard to any emergencies that may arise.

The trustees upon whom are conferred the legislative powers, are vested with no discretion to circumscribe their limits, or diminish their efficiency, but must transmit them unimpaired to their successors.

A contract, by which the village of Kalamazoo bound itself to take charge of a market-house for a period of years, and to provide by ordinance for renting the stalls, and confining the sale of certain articles thereto, created a monopoly, was contrary to the policy of the law, and could not be tolerated.

No action lies on such contract against the trustees of the village, for a refusal by the village to exercise its corporate legislative powers in taking charge of the market-house and renting the stalls.

THIS was an action brought by George H. Gale against the village of Kalamazoo, for a breach of contract in refusing to exercise the legislative powers of the village, to carry out an agreement for renting the stalls, and regulating the sale of certain articles in the Public Market-House.

In consideration of the plaintiff's building a market-house to be known as the Kalamazoo Public Market-House, and placing the same under the control of the village authorities for ten years; the village undertook to rent the stalls from year to year for such rents as they and the plaintiff should agree upon, and to have the same attended to by a competent manager. And furthermore agreed that during the continuance of the contract there should be no other public market-house in the village, provided this proved large enough.

By a village by-law passed at the time of the contract, it was provided that the sale of all articles therein mentioned, should, during market hours, be confined to the said market-house.

The village authorities refused to carry out the agreement, and contended that the contract divested the corporation of some of its legislative authority, and that it created a monopoly in its markets for the benefit of an individual.

H. F. Severens and *D. D. Hughes*, for plaintiff.

G. V. N. Lothrop and *C. J. Walker*, for defendant.

The opinion of the court was delivered by

COOLEY, J.—The objection made by the defendants, that the contract sued upon appears to be the contract of the president and trustees of the village of Kalamazoo as individuals, instead of the contract of the village itself, does not appear to us well founded. The averment in the declaration is that "the said plaintiff and the said defendant entered into their certain contract or agreement in writing, which said contract or agreement sealed by the said plaintiff and by the said defendant by its agents and servants, the president and trustees of the village of Kalamazoo, executing the same and having full power and authority so to do, and to bind the defendant thereby, is in the words and figures" which are given in full. This averment is sufficient to embrace whatever was essential to confer upon the president and trustees the proper authority to make the contract on behalf of the village; and it must be taken to be the contract of the corporation unless the instrument, as thus set out, shows upon its face that it is the contract of the officers and not of the corporation. We think it entirely clear from the terms employed that it was intended to be the contract of the village; and although the words used are not the most suitable for expressing in clear legal language the intent to bind the corporation, yet, when the proper village authorities having power to make contracts on its behalf, assume officially to enter into an engagement which only the corporation could properly make, and in so doing declare themselves and their successors in office bound by its conditions, the purpose by this language to bind the corporation is too evident to be brought in question. We think there is no want of due formality here, if the contract in its essentials is one the village had the power to enter into.

The question whether by this instrument the corporation has not assumed obligations not warranted by the law, is one of considerable importance, and possibly of some difficulty. It is argued on the one hand that the village authorities have undertaken by this instrument to divest the corporation of some portion of its legislative authority, and to create a monopoly in its markets for the benefit of the plaintiff, while on the other it is

insisted that there is nothing unusual in the contract, and that in making it the village has not gone beyond the ordinary exercise of municipal authority in the regulation and control of village markets. These diverse views have been presented with no ordinary ability and force, and we find it necessary to examine somewhat in detail the various provisions of the contract from which such different conclusions are drawn.

The plaintiff, it appears, undertook to build a market-house, to be known as the Kalamazoo Public Market, and to be placed under the control of the village authorities for ten years. The authorities were to rent the stalls from year to year, or for such other times as might be agreed upon, for such rents as they and the plaintiff should fix upon, and to pay over the rents to the plaintiff. In consideration of the building of the market-house, the village undertook to have it attended to and supervised by a competent manager or clerk of its own appointment, whose duty, among others, it should be to require the observance of all ordinances or by-laws adopted by the president and trustees of the village for the purpose of properly regulating the market-house, and the vending of meats, fish, poultry, game, fruit, vegetables, eggs and butter, within the corporate limits of the village. The village also undertook that during the continuance of the contract there should be no other public market-house in said village, provided the market-house to be built by the plaintiff should prove large enough to accommodate the public for the purposes aforesaid, and that the sale of all the articles above specified within the corporate limits of said village should, during market-hours, be confined to said market-house, or on the ground specified in a village by-law relating to public markets, referred to in said contract, and which was passed at or about the date of the contract with a view to giving it effect.

These are the main provisions of the contract which the plaintiff avers has been fully performed on his part. The general purpose was to induce a private citizen to erect a market-house for the village, the authorities undertaking, in order that he might be compensated therefor, to confine the marketing of the citizens, during market hours, to the building and its vicinity, to appoint a proper officer for the enforcement of all by-laws and ordinances relative to the market and to the vending of market articles, and to control and rent the stalls for the benefit of the plaintiff.

There can be no doubt whatever that such a municipal corporation, if possessing under its charter the usual powers, would have the right to provide itself with the proper building for a public market, either by renting, buying or contracting for the building of the same, and that its contract for that purpose would be binding upon it to the same extent as would be the contract of an individual in a matter pertaining to his own private business. Indeed, in providing its members with this convenience, this public corporation would be acting in no different capacity than would any private corporation in providing any convenience for the discharge of its corporate functions, and there could be no difference in the legal rules, which would be applicable. The legislative power of the village might be called into exercise in order to the giving of the proper authority for the contract, but in entering into the contract the village must be regarded in the light merely of an individual proprietor. And had the village in this instance contracted to pay the plaintiff for his market building when constructed, or for the rent thereof, the questions now before us could not have arisen. Such a contract would not in any manner have hampered the legislative authority of the village; for though irrevocable, it would not have precluded the authorities from abandoning the use of the building for market purposes at any time, or from establishing other markets, if in their opinion the convenience of the public would be better subserved thereby.

The contract in question, however, is not only entered into in pursuance of an exercise of legislative authority on the part of the village, but it undertakes to control that authority in several important particulars.

1. It requires the appointment of a competent manager or clerk to attend to and supervise the market-house, and to require the observance of the ordinances and by-laws relative to the marketing within the village. For this purpose legislative action would have been essential, and must consequently have been within the contemplation of the parties when the contract was made;

2. It binds the authorities not to permit any other market-house, provided the one erected by the plaintiff should prove large enough to accommodate the public; and

3. It undertakes that the authorities shall restrain the ordinary marketing within defined bounds.

In each of these particulars this contract differs widely from one which should merely put the city in possession of a market-house to be controlled and disposed of according as subsequent circumstances should appear to render desirable. Suppose, in order to illustrate the difference, that the village, after a year's experiment, should be satisfied that market limits and a market-house were not desirable; that it was better that every person be allowed to sell where he could find customers, and to buy where he could procure what he needed, and that a manager or clerk of the market was unnecessary; in the one case, the village might have upon its hands a building for which it had no need, but in the other, if this contract possesses any legal validity, it would have obligated itself for a term of years to continue a system which experience had demonstrated was not for the public good. Or, suppose the subsequent growth of the village should demonstrate that the location chosen for the market-house was not the proper and suitable one, though the market itself was needful; in the one case, by proper exercise of legislative authority, a new site might be chosen, but in the other the village would not only have bound itself to continue a useless market, but would have precluded itself from the establishment of one which would accommodate the public needs.

If a municipal corporation can preclude itself in this manner from establishing markets wherever they may be thought desirable, or from abolishing them when found undesirable, it must have the right also to agree that it will not open streets, or grade or pave such as are open, or introduce water for the supply of the citizens except from some specified source, or buy fire-engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might in various directions engage it in permanent contracts, which, while ostensibly for the public benefit, should im-

pose obligations precluding future improvements, and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For if the village might bind itself to one market-house for ten years, it might do so for all time to come; and if it might agree that improvements and conveniences of one class might be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots that all improvements of every description should be so located or made as to conduce to his benefit, irrespective of that of the general good.

It will not do to say of such a contract that it must be assumed to have been reasonable, in view of the actual condition and wants of the village, and of its probable growth and future needs. What would be thought proper for the village this year, might be found worse than useless the next, and no official prescience could determine with absolute or even tolerable certainty what changes a few years might work. Indeed it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any or its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successor. This is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition.

But there is at least one feature of the contract which would invalidate it, even if we were to be confined to a consideration of existing facts, and were at liberty to assume that the circumstances bearing upon its reasonableness would continue unchanged for the whole period of ten years. Not only was the marketing to be confined to one locality, but the plaintiff was to have an unlimited right to control the occupation of the market-house through the power given him to determine the rents to be paid by lessees. This vested in him a practical monopoly of the public market, and though it is possible that he might exercise his rights impartially as between dealers, and with an eye to the public

good, we cannot lose sight of the fact so well stated in the old case of monopolies, that "the end of all these monopolies is for the private gain" of those who hold them: *Davey* v. *Allain*, 11 Rep. 84; Broom Const. L. 238. They are founded in destruction of trade, and cannot be tolerated for a moment. In the brief for the plaintiff it is sought to meet this difficulty by the provision in the village ordinance that the leasing of stalls should be by auction; but we do not find in the contract anything which binds the plaintiff to assent to the rent offered at auction, or which would preclude him from arbitrary discriminations among bidders. Nothing appears to us plainer than that the plaintiff, in fixing upon the rents that were to be paid for his benefit, was to have a substantial control, and this may fairly be assumed to have constituted an important inducement to him in entering into the contract. It is also argued on behalf of the plaintiff that the village cannot be at liberty to dispute the validity of the contract until it is found actually to impede the proper exercise of municipal powers, and that even then it must give way only so far as it shall be found to constitute an obstruction; but the declaration shows that the breach of contract complained of is a refusal to exercise the corporate legislative powers in taking charge of the market and renting its stalls, and an actual exercise of such powers by a repeal of the ordinance relative to markets. We can have no occasion to consider what force there may be to this argument in a case to which it may be applicable, when the case before us is one where the ground of complaint is that the village has exercised a legislative discretion vested by law exclusively in the municipal authorities, and upon the continuous and unlimited possession and exercise of which no restraints or limitations can be imposed themselves, or by any other authority than the legislative power of the state.

We have not so far considered what the effect upon the contract might have been had section thirteen added to the ordinance relative to markets been in force when the contract was entered into. That section appears to have been adopted February 3d 1868, and provided that whenever in the judgment of the corporate authorities the market-house should be too small, or from any cause not sufficient to meet the wants of the public, it should be lawful for the corporate authorities to establish other market-houses, or permit the sale of articles named in the ordinance by

any person or persons anywhere within the corporate limits. The contract bore date May 11th 1867, and though it is said the plaintiff does not complain of this amendatory section of the ordinance, it is clear that he had the same right to complain of it, so far as it affected the stipulation of the contract, that he had to complain of any other act in disregard of those stipulations.

Our conclusion is that the village has incurred no liability to the plaintiff by the acts and omissions complained of, and that the judgment of the court below should be affirmed.

The other justices concurred.

United States Circuit Court, Southern District of New York.

WILLIAM A. BRITTON v. BENJAMIN F. BUTLER.

Although commercial intercourse between the states in insurrection and those in occupation of the United States during the late war was unlawful, and therefore a bill of exchange drawn in Mississippi on a person in New Orleans while the latter was under control of the Federal army was void, yet a capture of such bill by the United States commander did not authorize him to collect and confiscate the money in the hands of the drawee in New Orleans.

Whether money voluntarily paid by the drawee under such circumstances can be recovered back, not decided.

An action of *assumpsit* to recover money so seized, not within the statute of March 3d 1863, limiting actions for arrests or imprisonments under color of authority of the United States to two years.

Vose & McDaniel, plaintiff's attorneys. *E. P. Wheeler*, of counsel.

Develin, Miller & Trull, defendant's attorneys. *John E. Develin*, of counsel.

BLATCHFORD, J.—This suit was brought in a state court and transferred into this court. The declaration is in *assumpsit*, on the money counts and an account stated. The damages are laid at $15,000, and the causes of action are alleged to have occurred at New Orleans, in the state of Louisiana, on the 1st day of September 1862. The defendant pleads the general issue and two special pleas. To each of the special pleas a special demurrer is interposed by the plaintiff, alleging defects in substance and form.